

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA,	.	
Plaintiff,	.	Case No. 1:06-cr-111-1
- v -	.	
	.	Status Conference
STEVEN E. WARSHAK,	.	
Defendant.	.	
.		
UNITED STATES OF AMERICA,	.	
Plaintiff,	.	Case No. 1:06-cr-111-2
- v -	.	
	.	Wednesday, April 13, 2011
HARRIET WARSHAK,	.	2:05 PM
Defendant.	.	Cincinnati, Ohio
.		

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE S. ARTHUR SPIEGEL, SENIOR JUDGE

APPEARANCES:

For the Plaintiff:	MARK L. JOSEPHS, ESQ. U.S. Department of Justice Office of Consumer Litigation P.O. Box 386 1331 Pennsylvania Avenue, N.W. Suite 950N Washington, DC 20044
For the Defendant Steven E. Warshak:	MARTIN G. WEINBERG, ESQ. 20 Park Plaza Suite 905 Boston, Massachusetts 02116
For the Defendant Harriet Warshak:	MARTIN PINALES, ESQ. Strauss & Troy The Federal Reserve Building 150 East Fourth Street Cincinnati, Ohio 45202-4018

1 APPEARANCES (Continued):

2 Also present: Robert C. Frommeyer, Jr., Probation
Officer

3 Law Clerks: Keith E. Syler, Esq.
4 Chandra Napora, Esq.

5 Court Reporter: Luke T. Lavin, RDR, CRR
838 Potter Stewart U.S. Courthouse
6 100 East Fifth Street
Cincinnati, Ohio 45202
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P R O C E E D I N G S

(In chambers at 2:05 PM.)

THE COURT: Well, I guess the first thing I have to ask you, do I have jurisdiction to conduct this conference?

I'll start with the government. Is there a motion for certification, motion to certify filed? Do you know if the certiorari is?

MR. WEINBERG: No, no.

THE COURT: Okay. And I guess the mandate come down.

MR. JOSEPHS: Yes.

MR. PINALES: The mandate has come down.

THE COURT: And so that I do have jurisdiction?

MR. PINALES: Yes, Your Honor.

THE COURT: Are you within time, or has the time passed to file a motion for certiorari?

MR. WEINBERG: We have a few more weeks to file the certiorari motion, but we have not asked for a stay, and we completely agree that Your Honor has complete authority over the resentencing.

THE COURT: Okay. Well, I'll ask the United States first. What's left for me to do by the court of appeals?

MR. JOSEPHS: Well, Your Honor, the court of appeals simply remanded to get a better explanation of the loss figure that was used in the sentencing calculation. And it was a little confusing, because at the statement prior to the

1 sentencings Your Honor said there would be a -- the loss was a
2 hundred million based upon the statements of facts accompanying
3 the plea agreements that the cooperators entered into. And
4 then at both Steven Warshak and Harriet Warshak's sentencing
5 Your Honor used a loss figure of over 400 million.

6 THE COURT: The statement I made at the time of
7 sentencing before actually imposing the sentences on each of
8 the individuals.

9 MR. JOSEPHS: Right.

10 THE COURT: Okay.

11 MR. JOSEPHS: That was where you said a hundred
12 million, and then at the actual sentencings for the Warshaks
13 you said over 400 million, and the court simply remanded to get
14 a better explanation. And it's our view that Your Honor --

15 THE COURT: I think I probably got the idea from the
16 probation department.

17 Do you know anything about it --

18 MR. FROMMEYER: Yes, Your Honor.

19 THE COURT: -- Mr. Frommeyer?

20 MR. FROMMEYER: Yes. As Mr. Josephs has put it,
21 that's my understanding, our understanding of the situation.

22 THE COURT: How did I use 400 million? I know 450
23 million was something based on, I guess, the gross receipts.

24 MR. FROMMEYER: Right. And actually in the
25 presentence report in our calculations we used the \$400 million

1 figure. However, I guess there was a meeting with all of the
2 defendants prior to sentencing that at that time, Your Honor,
3 you stated that you were going to use the 100 million -- over a
4 hundred million dollar loss figure and then, at sentencing,
5 used essentially what was in the presentence report there.

6 So this may make it easier if I just said this from the
7 probation officer's point of view. If you use the \$100 hundred
8 million figure, it's going to be the same Guideline calcula-
9 tions if you use the higher one. And the reason is is because
10 he was facing a life sentence based on the Guideline calcula-
11 tions, and if you reduce the loss figure, even if -- and
12 there's a four-level reduction in that, it would still be life.

13 THE COURT: As a maximum?

14 MR. FROMMEYER: As the sentence as far as the
15 Guideline imprisonment range is concerned. So --

16 THE COURT: I departed from it, I take it.

17 MR. FROMMEYER: Yes. And you actually levied a 25-
18 year sentence through a variance. So it really doesn't matter.
19 If you use the smaller loss figure, it would essentially -- you
20 would --

21 THE COURT: Since you're very bright, Mr. Frommeyer,
22 why in the devil did the court of appeals send it back for
23 resentencing if it really, in effect, doesn't make any
24 difference?

25 MR. FROMMEYER: Because I think that they were wanting

1 justification for the higher loss figure under the 3553.

2 THE COURT: Should I blame it on the parole depart-
3 ment?

4 MR. FROMMEYER: I'm sorry?

5 THE COURT: Should I blame it on probation? I used
6 the one you suggested or your office suggested.

7 MR. FROMMEYER: I think they were looking for the
8 justification, if I'm correct.

9 MR. JOSEPHS: Yes.

10 THE COURT: Well, that's the justification, I think.

11 MR. FROMMEYER: Right.

12 THE COURT: What do you have to say about that, Mr.
13 Josephs?

14 MR. JOSEPHS: Your Honor, the government agrees that
15 if the hundred million dollar figure is used, the Guideline
16 range doesn't change. And since Your Honor departed down for
17 both Harriet Warshak and Steve Warshak, even if you reduce the
18 points by four, you're still at the same Guideline range.

19 THE COURT: All right. I guess it's -- now should I
20 go with you, Mr. Weinberg? What do you believe?

21 MR. WEINBERG: Well, I believe that the court of
22 appeals sent it back to Your Honor for resentencing. They
23 didn't limit it to --

24 THE COURT: What do you mean by resentencing?

25 MR. WEINBERG: For Your Honor to conduct a new

1 sentencing decision and hearing on Steve Warshak and --

2 THE COURT: What do I take into account if I
3 resentence now compared to what I did back in, what was it, May
4 of 2010? Would I use the same factors and considerations in
5 imposing sentence?

6 MR. WEINBERG: Well, there would be at least one new
7 or two new ones.

8 THE COURT: What are they?

9 MR. WEINBERG: The Supreme Court decided this year in
10 a case called *Pepper v. U.S.* that post-offense conduct and
11 rehabilitation should be considered whenever a court is
12 conducting resentencing as you would be with Mr. Warshak. For
13 whatever reason it came back --

14 THE COURT: Okay.

15 MR. WEINBERG: -- not just for a single factor.

16 THE COURT: It used to be in the Sixth Circuit there
17 was always a problem when they remand for resentencing, whether
18 the Court could change a sentence, could really do it all over
19 again, or whether it was bound to stay within the narrow
20 confines of the remand.

21 Do you know what I'm talking about?

22 MR. WEINBERG: I do, Your Honor.

23 THE COURT: And I didn't read any confines to the
24 remand. How does the government view that?

25 MR. JOSEPHS: Confines in terms of what you can --

1 THE COURT: Sending it back to me for resentencing.

2 MR. JOSEPHS: Yes, Your Honor. The sentence was
3 vacated, so Your Honor does have to do a resentencing.

4 THE COURT: So I don't have to worry about the
5 sentence that's been vacated, so I can impose a new sentence --

6 MR. JOSEPHS: Yes, Your Honor.

7 THE COURT: -- based on current considerations too?

8 MR. JOSEPHS: Well, Your Honor, the government doesn't
9 think you need to consider anything else.

10 THE COURT: Well, I do. Whether the government thinks
11 so or not --

12 MR. JOSEPHS: But I understand where you're coming
13 from, Your Honor.

14 THE COURT: -- the Supreme Court says we can take
15 those into account.

16 MR. JOSEPHS: And Mr. Weinberg is correct that the
17 Court can take into account post-sentencing information.

18 THE COURT: So what do you think, Mr. --

19 MR. PINALES: I agree. I think *Pepper* is --

20 THE COURT: Don't you have any opinions?

21 MR. PINALES: I do have some, even on this case, Your
22 Honor. I think that --

23 THE COURT: His glasses get steamed up when he's
24 talking.

25 MR. PINALES: I won't go there.

1 I think that the remand is a complete resentencing.

2 THE COURT: Okay.

3 MR. PINALES: I think *Pepper* says you can take into
4 consideration everything now, including since sentencing to the
5 date of the new sentencing.

6 THE COURT: That's what I want to know about.

7 MR. PINALES: So I believe --

8 THE COURT: Anything good happen to your client?

9 MR. PINALES: She's still living. She's -- I speak to
10 her occasionally, and some days are very good and some days are
11 not.

12 THE COURT: Is it any different for you and me?

13 MR. PINALES: No, Your Honor. Her doctor, latest
14 report that I got -- and I do hear from him periodically -- is
15 she seems to be stabilized now. She is having a very difficult
16 time financially. I mean, she has -- she's trying to live off
17 of --

18 THE COURT: Money she had hidden in the safe?

19 MR. PINALES: No. She has no safe; she has no money
20 hidden. She's trying to live off of what little social
21 security she and her boyfriend are getting.

22 THE COURT: What does she get, 650 a month?

23 MR. PINALES: Something like that, Your Honor.

24 THE COURT: And he gets some too?

25 You probably know that. What's the name of the young lady

1 that has this case, the probation officer?

2 MR. FROMMEYER: Laura Jensen.

3 THE COURT: Laura. I guess I get -- I've been getting
4 monthly reports from her.

5 MR. FROMMEYER: Yes.

6 MR. PINALES: Right.

7 THE COURT: It actually looks like a report from her
8 checkbook.

9 MR. PINALES: "I spent this much on groceries and this
10 much here."

11 THE COURT: Absolutely. That's all there --

12 MR. PINALES: I know; I know. So she is -- she's
13 having a very difficult time and has basically, because of her
14 health --

15 THE COURT: What is her difficulty, just financially,
16 or healthwise?

17 MR. PINALES: Financially. But she stays at home. I
18 mean, she really -- she's not confined to her home, but she
19 is --

20 THE COURT: Where is she living?

21 MR. PINALES: She's living across the river with Jimmy
22 Doyle, her --

23 THE COURT: Who is, really, Jimmy Doyle?

24 MR. PINALES: He's been a boyfriend. I mean --

25 THE COURT: Okay. That's all right.

1 MR. PINALES: I don't like to use the word
2 "boyfriend." He's a man friend.

3 THE COURT: Well, you're complimenting her.

4 MR. PINALES: And I'll tell you, she's very fortunate
5 that he's been around, because, obviously, she can't drive,
6 can't get to the doctor without him.

7 He probably shouldn't be driving, but he gets her to the
8 doctor, gets her --

9 THE COURT: Don't say things like that. How old are
10 you?

11 MR. PINALES: I'm 68, Your Honor.

12 THE COURT: Okay.

13 MR. PINALES: I'll be 69 in a couple of months.

14 THE COURT: Okay. Go ahead.

15 MR. PINALES: God willing.

16 THE COURT: I'm supposed to say that, not you.

17 MR. PINALES: I can say that, because I need all the
18 help I can get. And so she's very fortunate to have him,
19 really. I think that without him she would not -- I wouldn't
20 be talking.

21 THE COURT: Has she visited her son at all?

22 MR. PINALES: She has gone on a regular basis to visit
23 with him.

24 THE COURT: Where is he, down near Ashland?

25 MR. PINALES: Used to be. He's up --

1 MR. WEINBERG: He's near Youngstown.

2 MR. PINALES: Yeah.

3 THE COURT: Youngstown?

4 MR. WEINBERG: Yeah. The BOP sent him from West
5 Virginia to northeastern Ohio.

6 THE COURT: Is that a new facility up there?

7 MR. WEINBERG: I don't think it's new. It's Elkton.

8 MR. FROMMEYER: Elkton, yeah. Your Honor, it's
9 probably eight or nine years old.

10 THE COURT: What level security is it?

11 MR. FROMMEYER: Well, there's different -- the
12 campus --

13 THE COURT: They have different varieties?

14 MR. FROMMEYER: Yeah. Yeah, they have different
15 security levels there depending. They have a camp and they
16 have the low depending on -- you know, sometimes the camp and
17 all that is right outside.

18 THE COURT: They do have a camp?

19 MR. FROMMEYER: They have a low security --

20 MR. WEINBERG: He's in a low, Your Honor. He'd been
21 transferred from a medium that he went to because of the -- he
22 had so many years left, and then he went into a low. But he's
23 been regularly visited by Harriet and by his wife and kids.

24 THE COURT: Did you see the very appealing letter he
25 wrote me?

1 MR. WEINBERG: He sent me a copy, yes, Your Honor.

2 THE COURT: Did you all get a copy of it?

3 MR. FROMMEYER: No, we did not, Your Honor.

4 THE COURT: Well, I've got to find it somewhere. I
5 think counsel for the government should have it, or at least
6 probation should have it.

7 MR. WEINBERG: Okay. I will make sure that --

8 THE COURT: Okay. I think the government should have
9 it too.

10 Now, Mr. Weinberg -- well, how -- I've left her out. And
11 what did I sentence her to?

12 MR. PINALES: Two years.

13 THE COURT: Two years. And she's how old, 77?

14 MR. FROMMEYER: She's 77.

15 MR. PINALES: 77, yeah.

16 MR. FROMMEYER: She'll be 78 in December.

17 THE COURT: And she's been a very good defendant since
18 she was sentenced?

19 MR. PINALES: Yes, she has.

20 THE COURT: Okay.

21 MR. PINALES: I mean, I think she --

22 THE COURT: That will be up to the probation depart-
23 ment to advise, of course.

24 MR. FROMMEYER: (Nods head up and down.)

25 MR. PINALES: Uh-huh.

1 THE COURT: Why don't you do a presentence report over
2 again.

3 MR. FROMMEYER: Okay.

4 THE COURT: Well, you know, it's an amendment to it
5 based on remand.

6 MR. FROMMEYER: Would you like an addendum covering
7 all that, or would you like a whole new report?

8 THE COURT: I don't think I need a whole new report,
9 do I? I just need the addendum from the time I sentenced him
10 and her up to the present time.

11 MR. FROMMEYER: We can do that.

12 THE COURT: And the considerations that I can take
13 into account --

14 MR. FROMMEYER: Right.

15 THE COURT: -- on the law that's been developed since
16 then.

17 MR. FROMMEYER: Uh-huh.

18 THE COURT: The ball's in your court, Mr. Weinberg.

19 MR. WEINBERG: No, I agree. I think what -- Mr.
20 Warshak's very different, you know, attitude since he went to
21 jail. He understands what he did. He understands the harm he
22 caused his mother and the harm he caused his wife and children
23 and everybody and, you know, wishes he had to do it over again.
24 You don't get second chances in the system. But he has learned
25 a humbling lesson by being in prison.

1 THE COURT: So anything I do less than life would be a
2 variance?

3 MR. FROMMEYER: Yes, Your Honor.

4 THE COURT: Or a departure?

5 MR. FROMMEYER: Right.

6 THE COURT: Yes which, or both?

7 MR. FROMMEYER: Both. Well, you could actually do
8 both or you can do one or the other.

9 THE COURT: Well, no. I think there's a distinction.

10 MR. FROMMEYER: There is.

11 THE COURT: Departure is within the --

12 MR. FROMMEYER: The Guidelines.

13 THE COURT: -- within the Guidelines. A variance is
14 below the Guidelines, above or below the Guidelines.

15 MR. FROMMEYER: A variance is any reduction or
16 increase that is not Guideline based.

17 THE COURT: Well, that would sort of be like the
18 *Pepper* case.

19 MR. FROMMEYER: That would be correct.

20 THE COURT: It would take it all into account.

21 MR. FROMMEYER: Right. Yes, Your Honor.

22 THE COURT: Okay. I'd like probation's view of that.

23 MR. FROMMEYER: We will give you a -- as part of the
24 addendum to that, we'll add a recommendation.

25 THE COURT: Okay.

1 MR. FROMMEYER: We'll talk about variance issues and
2 we'll talk about a recommendation so that you'll have our
3 opinion.

4 THE COURT: I don't know. Are you going to -- I'd
5 like a recommendation on the sentence for both of them.

6 MR. FROMMEYER: We'll do it for both.

7 THE COURT: Because I have ideas of what I'm going to
8 do.

9 What are the considerations, taking Warshak today, that
10 would warrant the variance?

11 MR. FROMMEYER: Well, the big one, I would have to
12 say, is disparity in sentencing. And depending on --

13 THE COURT: You mean between him and the other people
14 that are getting --

15 MR. FROMMEYER: No, between him and other defendants.

16 THE COURT: In this case?

17 MR. FROMMEYER: No. Other defendants that had similar
18 conduct across the country or across the district.

19 THE COURT: You mean he was hit heavier?

20 MR. FROMMEYER: Yeah. Yes, Your Honor.

21 THE COURT: How do you provide on that?

22 MR. FROMMEYER: Actually, we're doing a little
23 research on another separate case right now on some of that.
24 And, you know, the problem is is that the way the Guidelines
25 are formulated, in the 2B1.1 Guideline, the driving force

1 behind that is the loss figure. And what happens is, is that
2 once you get to a certain point, the problem is is that you
3 have the statutory maximum penalties and you have company --
4 some frauds are a hundred million, some of them are 400
5 million, some of them are in the billions. And we've had --
6 there's a case in the district that was in the billions of
7 dollars.

8 THE COURT: Who was that? Which case?

9 MR. FROMMEYER: It was a health care company out of
10 Columbus that -- and they recently -- and I think it's still in
11 the Sixth Circuit. Some of this stuff's still in the Sixth
12 Circuit.

13 THE COURT: Did Judge Marbley have that one?

14 MR. WEINBERG: Yes.

15 MR. PINALES: Yes.

16 MR. WEINBERG: Yes, Your Honor.

17 MR. FROMMEYER: And part of the problem that we are
18 having considering is is, well, when you're comparing a billion
19 to a hundred million, you know, there is some -- the weight
20 there, you're not getting any additional --

21 THE COURT: What was the guy given up there who had
22 the billion?

23 MR. FROMMEYER: Well, the top guys were getting 30
24 years on that, but they were also capped. You kind of --
25 depending on how many counts they were convicted of, they were

1 capped at 30 years anyway because of the statutory maximum.

2 But if there's more than one count, you can kind of group them
3 and kind of separate the penalties out there and kind of get it
4 above there.

5 THE COURT: I think that ought to be discussed too in
6 your --

7 MR. FROMMEYER: Well, we're going to discuss that,
8 because like I said --

9 THE COURT: Well, I think you should discuss also the
10 sentencing I did of the other defendants in this case. The
11 only -- did anybody get more than two years?

12 MR. FROMMEYER: No, Your Honor. But no one was held
13 to the loss figure that -- no one was held to the loss figure
14 that Mr. Warshak was held to other than his mother, from my
15 understanding. And so the reason why the sentences were so far
16 apart was, is they were only held for the count -- they were
17 held responsible for what they did, and because he was the head
18 of the whole company, he basically got the whole ball of wax.
19 And because of that, there were -- I mean, in the chain of
20 culpability, he was at the top.

21 THE COURT: Okay. I think you ought to discuss that
22 too in your recommendation or justification, recommendation,
23 whatever you call it, and also with her.

24 MR. WEINBERG: Some of them I think were a hundred
25 million.

1 MR. FROMMEYER: Were a hundred million, yes.

2 MR. PINALES: Yeah.

3 MR. JOSEPHS: Yes. And as Your Honor stated at
4 sentencing, you talked about that Steven Warshak was more
5 culpable than everybody else because he sort of drove the train
6 here, and the different sentences between Steve Warshak and the
7 people who pled guilty wasn't so much surrounding the loss
8 figure, because, frankly, if it was a hundred million or 400
9 million, it still would have been life in the Guidelines, and
10 Your Honor went under the Guidelines and imposed a 25-year
11 sentence.

12 And it's the government's view that nothing has changed and
13 that --

14 THE COURT: Do you think there's a message that the
15 court of appeals was sending without ever saying it, but having
16 a feeling about these cases?

17 MR. JOSEPHS: The government doesn't think so, Your
18 Honor, and that's simply -- I think they were --

19 THE COURT: Did you do the Erpenbeck? Was that
20 your -- do you remember I sentenced that guy --

21 MR. FROMMEYER: Mark Grawe did that, and Pat was
22 around. Pat Crowley was around for that.

23 THE COURT: I sentenced him to 30 years, and I think
24 it got sent back. Do you remember that at all? What was the
25 remand on it? Were you in that case?

1 LAW CLERK SYLER: Uh-huh.

2 MR. PINALES: No. I just peripherally had a witness.

3 THE COURT: I transferred the case out because there
4 was --

5 MR. FROMMEYER: Right.

6 THE COURT: -- one of the lawyers said that I was as
7 dumb as a rock.

8 (Laughter.)

9 THE COURT: Do you remember that?

10 MR. FROMMEYER: Well, Your Honor, but there was some
11 shenanigans.

12 THE COURT: I didn't want to build another bridge.

13 MR. FROMMEYER: There were some extra shenanigans that
14 were going on in that case.

15 THE COURT: Erpenbeck.

16 MR. FROMMEYER: Erpenbeck.

17 THE COURT: Because of his old man?

18 MR. FROMMEYER: Because of the obstruction and all
19 that that was happening with the planning, and they were trying
20 to tamper with a witness.

21 THE COURT: Oh, yeah.

22 MR. FROMMEYER: And then, of course, the father trying
23 to -- there was --

24 THE COURT: All the reason -- when it went bad, I
25 turned the case over to Sandy -- Judge Beckwith -- and I think

1 she sentenced him then to 25 years. It didn't really make
2 terribly much difference.

3 MR. FROMMEYER: Well, and then they found out just
4 recently that he had actually buried some money in the golf
5 course.

6 THE COURT: I was asking my law clerk what happened
7 over there, and I was explaining I had a similar case -- it
8 wasn't my case, it was another judge's case -- where somebody
9 during the presentence investigation pled guilty to a fraud
10 charge and, it turned out, didn't reveal property that the
11 person owned in Canada. And as I recall, the case came back, I
12 think, to Judge Beckwith.

13 I don't know if there was another criminal charge against
14 the guy or for lying to an agent or whatever, but she sentenced
15 him to 25 -- 200 -- two and a half years -- or 25 months,
16 rather.

17 Do you know the case I'm talking about?

18 MR. FROMMEYER: No, I'm not. No, I don't, Your Honor.

19 THE COURT: And Erpenbeck, I wonder whether -- if
20 there's any charge placed against him for the money that was
21 buried. What was it, about \$350,000?

22 MR. PINALES: I think it's under investigation still.

23 MR. FROMMEYER: Yes, I think it is.

24 THE COURT: No, I thought somebody --

25 MR. PINALES: I think the brother who helped dig the

1 hole and bury it may have been charged.

2 THE COURT: And the owner of the property.

3 MR. PINALES: That I don't know. But I think the
4 brother was. And the funny part about it is all the money had
5 disintegrated, anyway, and couldn't be used.

6 THE COURT: I think that the treasury department has
7 techniques to determine -- to try and bring it back to the
8 point where they recognize it as being currency.

9 MR. PINALES: Oh, I think so. But he had no means of
10 digging it up and using it.

11 THE COURT: Do you remember before it all got finally
12 dug up there was a rumor about it, and I guess the feds. were
13 all over the place digging up the guy's lawn.

14 MR. PINALES: My son's father-in-law was playing golf
15 when the tractor-trailers came in and unloaded all the bull-
16 dozers, and he didn't know what was going on.

17 MR. FROMMEYER: I think that's across the river.

18 MR. PINALES: Across the river in Kentucky, yeah.

19 THE COURT: Summit Hills or something like that.

20 MR. PINALES: Something like that. I don't know the
21 name.

22 THE COURT: One of the guy's -- one of Erpenbeck's
23 beautiful homes was right on the edge of the property at a
24 country club. Well, I wondered if -- nothing was done to
25 Erpenbeck, but he's put away for 25 years.

1 MR. FROMMEYER: Yeah. So we're going to have a tough
2 time making similarities between this case and his case because
3 of all -- some of the extra stuff that was going on.

4 THE COURT: The extra stuff that you don't know about,
5 his father was a mean son of a bitch, if you excuse my expres-
6 sion, and everybody in northern Kentucky knew it. And he and
7 Erpenbeck --

8 Off the record for a second.

9 (Discussion off the record.)

10 THE COURT: You can go back on the record.

11 Do you think the court of appeals was trying to say some-
12 thing in that case, whether sentencing somebody to 20 to 30
13 years who had no real violence in their background, were not
14 career criminals in the sense, so forth, of the thing, that's a
15 little much?

16 MR. FROMMEYER: Well, without being a lawyer, Your
17 Honor --

18 THE COURT: Okay. You're not, I know.

19 MR. FROMMEYER: Okay? -- from probation's perspec-
20 tive, we do see that the courts are wanting more justification
21 in why the Court is doing or deciding a certain sentence. The
22 3553(a) factors which are a part of the sentencing, that is the
23 thing that there is a lot of attention being paid to, is is
24 there enough to support the decision, is there enough record to
25 support the decision that you're making. And that is the clear

1 message that everyone is getting, and that's what we're trying
2 to do to help provide in some of the language and the variance
3 language and things that we're suggesting in the report, but
4 also in our recommendations to give the Court some --

5 THE COURT: Well, one of the major things is to
6 protect society from any further criminal activity on the part
7 of the defendant. And in talking about his client
8 (indicating), there's probably very little.

9 And as far as Warshak, I suspect he probably learned his
10 lesson. I don't know. But I think when you're writing these
11 things up you might take those into consideration.

12 MR. FROMMEYER: (Nods head up and down.)

13 THE COURT: I don't believe, frankly, as a human being
14 and as a judge that putting people away for lengthy periods of
15 time accomplishes a damn thing. I've been told by prison
16 administrators, after somebody's been in prison for two years
17 or so -- and Judge Porter used to tell me this -- they sour on
18 life and they aren't -- as a human being they're not worth a
19 damn, getting out, because they can't get a job, they really
20 aren't trained for anything, and they just become a drag on
21 society if they don't get in trouble again.

22 But sending them to prison for a couple of years where they
23 really have to get the message and checking to see if they
24 really sincerely have made efforts to rehabilitate themselves
25 is something -- well, after this case here, it gives the judge

1 an opportunity to take some of that into account.

2 Now, that's what kind of stuff I'd like to get back on
3 Steve Warshak, and I'll leave it up to you. The same thing on
4 Mrs. Warshak.

5 Is there anything we need to talk about further on that?

6 MR. WEINBERG: No, Your Honor.

7 THE COURT: I guess I can set a sentencing date.

8 MR. WEINBERG: (Nods head up and down.)

9 THE COURT: I think I need briefing on all of this
10 from you all so I have something to rely on.

11 MR. JOSEPHS: Certainly, Your Honor.

12 THE COURT: How much time do you think you need? You
13 know what I'm thinking about. The briefing can be very simple
14 and very short and to the point. You may be able to both put
15 on some sort of agreed agreement I can put of record as to what
16 the remand allows me to do. I don't think that prejudices the
17 government. But you might have, each side might have some
18 views about what the sentence should be.

19 MR. PINALES: Could we defer that brief until after we
20 see the presentence report? Which I think will give us
21 something to look at, and especially on the from then to now
22 issues.

23 MR. FROMMEYER: Well, and there will be some variance
24 issues with disparity in sentencing that will be new. I mean,
25 obviously there was some -- a variance already that was granted

1 by the Court, but there's a -- and some of the disparity in
2 sentencing was one of the issues. But maybe that could be
3 expounded upon a little bit further based on what's happened
4 since then.

5 THE COURT: I think I just recently sentenced somebody
6 that I think shook up the prosecution, because I sentenced him
7 to a year and a day when he -- I think the minimum that he
8 could be sentenced was two years because of disparity in
9 sentencing. And the same with Corsmeier.

10 MR. FROMMEYER: Stephanie Corsmeier.

11 THE COURT: Yeah. She was the fall person in that.
12 She didn't get anything out of it economically.

13 MR. FROMMEYER: Right.

14 THE COURT: And I think she was taken advantage of by
15 some guys.

16 MR. FROMMEYER: Right.

17 THE COURT: But the guys pled guilty, and I tried her.
18 And it came back because I let some evidence in that they
19 thought shouldn't have been in that was prejudicial on whether
20 or not she was doing cocaine and that's why she got befuddled.

21 At any rate, they sent it back for resentencing. And I
22 think probation's recommendation was something like, somewhere
23 in the -- what was it, probably --

24 MR. FROMMEYER: Well, Your Honor, in that case, if you
25 recall --

1 THE COURT: Was that your case? Do you remember the
2 facts?

3 MR. FROMMEYER: Well, what I remember about --

4 THE COURT: I'm talking to the clerk behind you.

5 MR. FROMMEYER: Oh, I'm sorry.

6 THE COURT: Her name is Chandra Napora.

7 LAW CLERK NAPORA: The defense and the government in
8 that case had come to an agreed sentence of 18 months. But
9 probation's recommendation I think was --

10 THE COURT: That's right.

11 LAW CLERK NAPORA: -- closer to 24.

12 THE COURT: Well, the disparity in sentencing between
13 her, if they're recommending, and even agreed to, was even
14 higher than the principals who made a bundle of dough out of
15 the thing and pled guilty. And I put in the reason for doing
16 it because I thought the disparity was warranted.

17 She had a baby, and she was out on bond. She had a baby
18 and she was doing a good job, according to everybody. And I
19 don't know if the government's going to appeal it or not, but I
20 think it shook them up a little bit. Because her lawyer, they
21 had agreed to -- I think she was psychologically prepared to do
22 18 months, but a year and a day gives her a break in all kinds
23 of ways, I think.

24 All right. Well, I think you all understand what I want to
25 do. So when do you think you can get your report in?

1 MR. FROMMEYER: Your Honor --

2 THE COURT: What are you laughing for?

3 MR. PINALES: I just heard a sigh.

4 THE COURT: You're just laughing because I put it on
5 their back and not on yourself.

6 MR. FROMMEYER: I'm speaking for somebody else, but,
7 you know, in fairness --

8 THE COURT: Well, if it's going to go back, will you
9 explain to her?

10 MR. FROMMEYER: Yes. And --

11 THE COURT: We ought to have a transcript of this made
12 too.

13 MR. FROMMEYER: 30 days --

14 THE COURT: Okay, that's fine.

15 MR. FROMMEYER: -- for her to do it.

16 THE COURT: Can you type it up for me.

17 MR. FROMMEYER: And then, in fairness --

18 THE COURT: Well, then you talk -- in the 30 days then
19 you have got to go through your routine. You talk to counsel,
20 present them with a -- and then they have a chance to object to
21 it and come back.

22 MR. FROMMEYER: Right. And that's what I was going to
23 propose. If we could have 30 days to go through the records,
24 because there may be some interviews that need to be done or
25 that.

1 THE COURT: Oh, sure.

2 MR. FROMMEYER: And after the 30 days if we could
3 disclose that to the parties and let them have a couple of
4 weeks to kind of look at it and see what they want to do with
5 it and if they want to file anything in response.

6 And then, you know, I don't know if we want to go through a
7 whole objection process or if you guys are just going to file
8 sentencing memorandums or --

9 THE COURT: Oh, I'm sure they'll want to file a
10 sentencing memorandum based on --

11 MR. PINALES: I want to see what you do.

12 THE COURT: They may agree with you. They might agree
13 with what you come up with; they may not.

14 MR. FROMMEYER: Right. Well, that's why the two
15 weeks. And then if there's objections, we would need a couple
16 of weeks to kind of resolve, try to resolve them if that isn't
17 resolved. Then we can get in a final.

18 So what I'm saying is is we could have the report and
19 everything revolving around attorneys maybe in -- you know,
20 with you guys, are you okay with the two weeks and then maybe a
21 two-week turnaround time?

22 MR. WEINBERG: (Nods head up and down.)

23 MR. FROMMEYER: Okay. So that would be two months,
24 and then --

25 We could have a report to the Court in 60 days.

1 THE COURT: Okay. Well, is that cutting it short for
2 you? I was going to say August 1st. Is that 60 days? You've
3 got May, June and July.

4 MR. PINALES: It's a little bit longer, which is
5 better for my schedule.

6 THE COURT: August 1st.

7 MR. FROMMEYER: Okay, sure.

8 THE COURT: August 1st.

9 MR. FROMMEYER: Okay.

10 THE COURT: And schedule the sentencing sometime in
11 September. Is that all right?

12 MR. WEINBERG: Sure.

13 MR. FROMMEYER: So we'll try to get the report out in
14 30 days, and then we'll go from there.

15 MR. WEINBERG: Okay, great.

16 THE COURT: Mr. Josephs, did you come down from
17 Washington?

18 MR. JOSEPHS: Yes, I did, Your Honor.

19 THE COURT: I'm surprised. You've got a lot of
20 colleagues that are listed as receiving that opinion.

21 MR. JOSEPHS: Well, the main two that were on the
22 trial team, Your Honor, are out of town.

23 THE COURT: Oh. Did you notice all the lawyers on the
24 opinion, on the back? Somewhere around here I've got it.

25 MR. PINALES: We have the weight of the government

1 against us, Your Honor.

2 THE COURT: Don't you always.

3 MR. PINALES: Don't I always, yes. Then I go home.

4 THE COURT: Well, don't blame your wife like I blame
5 mine.

6 MR. PINALES: I'm not blaming her. I'm crediting her
7 for keeping me straight and narrow.

8 THE COURT: Let's see who all of them are. I was
9 surprised. Were there any amicus briefs filed or anything like
10 that?

11 MR. PINALES: Do you know?

12 There was. There was an amicus, yes.

13 MR. JOSEPHS: About the 2703 issue.

14 MR. WEINBERG: The electronic --

15 MR. PINALES: I remember that.

16 THE COURT: I thought I read a scholarly brief or
17 scholarly opinion, so --

18 MR. PINALES: It could have been a little more
19 scholarly.

20 MR. WEINBERG: Well, he's very scholarly.

21 THE COURT: Well, I don't know where I -- I saw the
22 list of people that got it.

23 I can't find the list of the people. Maybe it's in the
24 front here.

25 Okay. Well, I was surprised that so many people in the

1 government and various departments of the government. Let me
2 see if I --

3 MR. JOSEPHS: There were a few involved, Your Honor.

4 THE COURT: Where would they have listed who got
5 copies of it? I saw it here.

6 Oh, here it is. Have you met any of these people? Kevin
7 Bankston.

8 MR. WEINBERG: Kevin I have. He's the amicus from
9 California.

10 THE COURT: Oh, he's the amicus.

11 MR. WEINBERG: Yeah.

12 THE COURT: Which way was he going, your way or --

13 MR. WEINBERG: My way. He's from the Electronic
14 Frontier Foundation and wrote some briefs.

15 THE COURT: He's out in San Francisco.

16 MR. WEINBERG: Yeah.

17 THE COURT: Jenny Ellickson? I don't remember meeting
18 Jenny Ellickson. Department of Justice, Computer Crime and
19 Intellectual Property.

20 MR. JOSEPHS: Yes, one of the criminal divisions in
21 D.C.

22 THE COURT: Ben Glassman, Bob Goldstein, Dave Greer,
23 Mark Josephs. You're here.

24 Nathan Judish, who is that?

25 MR. WEINBERG: I think he's a --

1 MR. JOSEPHS: Computer section.

2 THE COURT: Hmm?

3 MR. JOSEPHS: He's in the criminal division.

4 MR. WEINBERG: He's a Washington lawyer that's in the
5 computer section.

6 MR. PINALES: The DOJ.

7 MR. WEINBERG: I was talking to him about the e-mail
8 issues.

9 THE COURT: What kind of a Washington lawyer?

10 MR. WEINBERG: He's in the Department of Justice
11 computer section.

12 THE COURT: Oh.

13 MR. JOSEPHS: He just addressed the e-mail issues.

14 THE COURT: Okay. Well, I was just surprised.

15 Do you know Linda Martin?

16 LAW CLERK SYLER: No.

17 THE COURT: Okay. She's a secretary of the clerk in
18 the court of appeals.

19 (Discussion off the record.)

20 THE COURT: All right. I think that's pretty much
21 what I wanted to cover today to make sure where I was and what
22 we can do and what we can't do.

23 Anything further from the justice department?

24 MR. JOSEPHS: No, Your Honor, except for the fact --

25 THE COURT: Hmm?

1 MR. JOSEPHS: -- except for the fact that the
2 government believes that the sentences were appropriate and
3 still does.

4 THE COURT: There's no what?

5 MR. JOSEPHS: That the government believes that the
6 sentences were appropriate and still believes that.

7 THE COURT: Well, I would think so.

8 I'm not going to ask you.

9 MR. FROMMEYER: (Shakes head from side to side.)

10 THE COURT: I'm not going ask you, Mr. Weinberg.

11 MR. WEINBERG: It was nice seeing you again, Judge.
12 Thank you.

13 THE COURT: I was going to say, how's your forehead?
14 Do you play tennis?

15 MR. WEINBERG: I do; I do. Not well, though. I used
16 to play a lot.

17 THE COURT: What's your handicap in golf?

18 MR. WEINBERG: No handicap. No golfer.

19 THE COURT: What kind of a boat do you have?

20 MR. WEINBERG: No boat.

21 THE COURT: You live in Boston?

22 MR. WEINBERG: Yeah.

23 THE COURT: What do you do all day?

24 MR. WEINBERG: Go to Fenway Park and I run.

25 THE COURT: Oh, you do?

1 MR. WEINBERG: I live three houses off the marathon
2 course, and that's what I do for exercise.

3 THE COURT: Oh, that's great. You look great.

4 And this one here, what have you been up to that you can
5 talk about?

6 MR. WEINBERG: I used to play a lot of tennis until my
7 calf separated.

8 MR. PINALES: Just I'm enjoying practice. I'm having
9 a good time.

10 THE COURT: You're over at Strauss Troy?

11 MR. PINALES: Strauss Troy, yeah. I love it.

12 THE COURT: They're nice guys over there.

13 MR. PINALES: Yeah.

14 THE COURT: They're real good lawyers.

15 Okay. Thank you all for coming in.

16 MR. PINALES: Thank you, Judge.

17 MR. JOSEPHS: Thank you, Your Honor.

18 THE COURT: Keith, I think we should put out some sort
19 of a memorandum order; not the conference so much but just the
20 timetable.

21 LAW CLERK SYLER: Yes.

22 THE COURT: So they'll know. And we can put a
23 scheduling --

24 Do you think September would be appropriate for sentencing?

25 MR. WEINBERG: That would be great.

1 MR. PINALES: That's fine with me.

2 MR. JOSEPHS: And Your Honor would want briefs before
3 then; right?

4 THE COURT: Yeah. Everything should be completed by
5 then.

6 MR. JOSEPHS: Right, right.

7 THE COURT: I want whatever you've got so I can see
8 it.

9 MR. PINALES: Thank you, Judge.

10 THE COURT: Okay. Thank you.

11 (Proceedings concluded at 2:45 PM.)

12 - - -

13 C E R T I F I C A T E

14 I, Luke T. Lavin, RDR, CRR, the undersigned, certify
15 that the foregoing is a correct transcript from the record of
16 proceedings in the above-entitled matter.

17

18 s/Luke T. Lavin
19 Luke T. Lavin
20 Official Court Reporter

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